UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
		Docket #16cv6832
CAMPBELL, et al.,	:	1:16-cv-06832-JPO-BCM
Plaintiffs,	:	
- against -	:	
CHADBOURNE & PARKE, LLP, et al.,	:	New York, New York November 9, 2017
Defendants.	:	
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PROCEEDINGS BEFORE
THE HONORABLE BARBARA C. MOSES,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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E X A M I N A T I O N S

Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

Exhibit Number	Description	ID	In	Voir Dire
None				

THE CLERK: Kerrie Campbell v. Chadbourne & Parke, LLP. Counsel, state your name for the record.

MS. ALEXANDRA HARWIN: Alexandra Harwin for the plaintiffs, from Sanford, Heisler, Sharp.

MR. ANDREW MELZER: Good morning, your Honor. Andrew Melzer, Sanford Heisler, Sharp, also for the plaintiffs.

HONORABLE BARBARA C. MOSES (THE COURT): Good morning, Ms. Harwin and Mr. Melzer.

MS. RACHEL FISCHER: Good morning, your Honor, Rachel Fischer, Proskauer Rose, for the Chadbourne defendants.

MS. KATHLEEN McKENNA: Good morning, your Honor, Kathleen McKenna for the Chadbourne defendants.

MR. EVANDRO GIGANTE: Good morning. Evandro Gigante, Proskauer Rose for the Chadbourne defendants.

MS. MELISSA COLON-BOSOLET: Good morning, your Honor, Melissa Colon-Bosolet for Norton Rose Fulbright US.

MR. STEVEN BIERMAN: Good morning, your Honor, Steven Bierman from Sidley for Norton Rose Fulbright.

THE COURT: I'm not going to attempt to say all your names, because there's so many of you.

Mr. Bierman, you rearranged your schedule?

MR. BIERMAN: I think that was the last

conference I think I rearranged my schedule.

THE COURT: All right, well, it's nice to see you all here. There are an awful lot of lawyers here for a dispute over whether search terms should have a "within 20" versus a "within 50" connector. But since disputes like that are, of course, what I live for as a federal judge, I'm happy to have all of the help possible on resolving these thorny issues.

Let us begin with the two disputes that don't require me to determine whether it's within 20 or within 50. First, the dispute regarding the individual email accounts of the individual defendants. I understand that this is about their non-Chadbourne & Parke email accounts, their Google or whatever accounts. My inclination -- and I'll let you speak to this -- my inclination is to say that what is good for the goose is good for the gander here; that if the plaintiffs' personal email accounts are to be searched, then the individual defendants are to be searched, as well, certainly, in the absence of any evidentiary showing that I can rely on that there is absolutely, positively nothing relevant and responsive in those personal email accounts. Since I am myself a human being -- believe it or not -- as well as a former law firm partner, I know that even individuals who generally make

it a practice to use their business email account for business don't always adhere to that 100% of the time. So I'm not prepared at this early stage to say there isn't going to be anything which is relevant and discoverable in those Gmail accounts or whatever they are. And I have not heard from the defendants any extraordinary facts concerning burden or expense that would perhaps move the needle on that. So that's my tentative, if you will.

I'll hear from Proskauer first.

MS. FISCHER: Thank you, your Honor. While I just want to point out that the parties in their ESI protocol stipulated and agreed that data sources such as emails do not need to be searched when a party certifies in writing that the data source does not contain responsive ESI. And we've provided that information to plaintiffs, we've provided that information to the Court. And the parties really are not similarly situated with regard to their use of personal emails. We've made that representation on behalf of the named defendants, and we know that at least one of the plaintiffs was using a Yahoo account for firm business. So it really is not quite the same, the plaintiffs and the defendants, who they were using a personal email.

THE COURT: Now, when you say you've certified it

in writing, does that mean you asked the individual defendants and they said no, we didn't use our personal accounts, and that's the basis of the certification?

MS. FISCHER: That's correct.

THE COURT: See, I'm not impugning your client's honesty in any way, shape or form; it's just that they're human. And I'm not at all confident, having been through this a lot of times in a lot of cases, that that's going to turn out to be accurate.

MS. FISCHER: Well, what we did, your Honor, I mean, at the outset of the case when we first -- not at the outset of the case, at the outset of discovery, when we first started looking at ESI, you know, we inquired of our custodians where responsive and relevant information would lie, both hard copy and electronic documents. And then when this dispute arose last week with plaintiffs as to whether the named defendants were using their personal emails, we again reconfirmed that they were not using it for business purposes or for any matters related to the firm.

THE COURT: You reconfirmed based on their unaided recollection, correct? I mean, did anyone do any test searches?

MS. FISCHER: We did not run test searches.

THE COURT: Yes. Search the personal accounts.

The next issue is whether to include the business emails, the law firm emails for three additional current or former partners at the firm who you are diplomatically, I guess, not naming in the publicly-filed joint letter, which is fine -- I don't need the names. I guess on this one my tentative -- I learned to be a lawyer in the Northern District of California, where you would literally call a certain number the night before you had a discovery motion, and you would hear a recording giving you the judge's tentative ruling. And then you had to call your opponent and call the clerk's office if you wanted to show up and argue against the tentative. So forgive my nomenclature; I have not yet set up a telephone number for tentative rulings here.

Anyway, on the second issue that you've briefed to me, my inclination is to say no, that is to say that we don't need these three additional custodians because nothing in the joint letter has persuaded me that it is likely that anything relevant will be, A, in their email accounts; and, B, not also in the email accounts of the 25 other or existing custodians, including the former and current members of the management committee.

So, Ms. Harwin, do you want to take that one?

MS. HARWIN: Sure. Your Honor, with respect to these three individual, defendants agreed already in their document responses that they would produce responsive documents concerning the circumstances of deacquitization, termination or change in status of partners --

THE COURT: Sure. But if you could address my concern, which is look, let's suppose that Mr. or Ms. former partner who vocally objected to the management committee's secrecy did in fact do that from his or her Chadbourne email account. But those emails would have gone to the management committee, right? So what are we missing here?

MS. HARWIN: Well, your Honor, presumptively, some did. But it doesn’t mean that the only emails that an individual sent regarding the management committee's secrecy in this instance went to the management committee. We have reason to believe that these concerns were not shared only with the management committee.

THE COURT: "Only" is not the question. What you would have to convince me to make these additional searches worth the candle is that Mr. or Ms. partner sent some truly relevant email that didn't go to any of the other 25 custodians whose accounts are being searched, that Mr. or Ms. partner sent a truly relevant email only to, you know,

their spouse or their psychiatrist -- that's not a good example because there'd be a privilege issue there -- and that notwithstanding the fact that this email was not shared with the management of the firm, it's somehow worth getting.

MS. HARWIN: Well, your Honor, with respect to that issue, whether there are emails that were unique to the non-custodians from the management committee, meaning emails that were sent to others at the firm, for example, such as other partners discussing these issues but not sent to the management committee members, those emails would be identified through a simple technological, you know, hit report as to unique documents.

THE COURT: Right, but we have to -- "we," someone, you or Chadbourne -- has to spend the time and money getting there before you dedupe. What assurance can you give me that after the deduping there's anything relevant left?

MS. HARWIN: Well, for example, emails that, you know, may exist in the system could be documents used to prepare for committees for conversations with the management committee, communications to other partners that would reflect oral discussions with the management committee. We have not engaged in discovery at this juncture where we've received -- we haven't subpoenaed these individuals. We

don't have the other information that we would need, apart from hit-count reports, that would identify whether there are unique documents here that were not shared with the management committee.

THE COURT: All right, so I'll tell you what. If you're in a position where you can give me more than speculation; if you talk to these folks, if you come up with an example from somebody else's email account of something important that didn't go to the management committee, try again, not now.

MS. HARWIN: Thank you, your Honor.

THE COURT: All right, now we get to the truly exciting part of this morning's agenda, which is the ESI search terms. How would you like me to approach that?

MS. HARWIN: Your Honor, what I would suggest is defendants already agreed that they would run these disputed search terms if the three additional custodians that we just talked about were not included in the searches. So I think that, given your ruling on this subject of the additional custodians, I think that we could proceed with all the searches as plaintiffs outlined them.

THE COURT: Ms. Fischer?

MS. FISCHER: We had offered as a compromise, given these three discovery disputes we're here about today,

we had offered as a compromise that we would run these searches. That was to avoid being here today. Here we are. You know, we're prepared to defendant our position as to why the additional 25,000 documents shouldn't be searched.

And, in addition, you know, this compromise that we had offered, now we do need to go back and call and search the named defendants' personal email. So there's certainly a significant amount of ESI that still needs to be done.

THE COURT: You want me to go through these search by search? Because, of course, that's what I went to law school to do, right, decide whether you're going to get a more relevant and manageable bunch of emails if the connector is 20 instead of 30 instead of 35.

MS. FISCHER: Your Honor, we think the numbers are significant, and this will add time and expense to our ESI review.

THE COURT: All right, let's do it. How do I tell from this chart here which ones I need to mediate on?

MS. HARWIN: So the chart, it's the yellow items are the ones that are disputed.

THE COURT: Unfortunately, mine is in black and white.

MS. HARWIN: Oh, there was a copy --

MS. FISCHER: We can identify them by number.

MS. McKENNA: We have a clean copy we can give you, your Honor.

THE COURT: Oh, that would be great. Hand up the color one for me.

For some reason, the one that I have is in black and white because my crack chamber staff obviously printed it for me in black and white.

MS. HARWIN: We delivered to chambers a color copy.

THE COURT: Fine. I have it now.

MS. FISCHER: Your Honor, I just want to note, as well, that in search No. 3 I believe the copy we just gave you is not redacted in ours, and in the public record it is redacted because there's a name on there that we had agreed and --

THE COURT: All right, I am making a note of that.

All right, so it's the yellow ones that are in dispute, correct?

MS. HARWIN: That's correct, your Honor.

THE COURT: Not the green ones. All right, so No. 3 with respect to Partner X, what is the dispute here? How do I read this?

MS. HARWIN: So the dispute, as with all these

disputes, has to do with proximity connectors. And defendants proposed a very narrow proximity connector of within 10, which given that the search itself contains the name of the partner and contains other terms specifically relating to her circumstance, it's an unnecessary modification.

THE COURT: All right. Defendants want near 10; plaintiffs want near 40. And is there a hit report that tells me the difference in volume between these two?

MS. FISCHER: I have some numbers. You know, we didn't have it at the time that we spoke last week. And the numbers are not totally precise because the unique counts on the plaintiffs' report are different than the unique counts on the defendants' report; but it's somewhere around -- it would be an additional 800, 900 documents, something like that.

THE COURT: All right, so on No. 3 we'll go with 40.

On No. 4, what is the difference between the near-10 connector that the defendants want and the near-20 connector that the plaintiffs want?

MS. FISCHER: It's about 980.

THE COURT: And what's the hit report at the defendants' level with the near 20?

MS. FISCHER: I'm sorry?

THE COURT: That's the difference, right? That's an additional --

MS. FISCHER: Plaintiffs' it was approximately 1,800; defendants was approximately 830.

THE COURT: Oh, I see. Okay. All right, we will go with near 10 on Item No. 4. Those are fairly tight terms; if it's not in the same sentence, it's not that likely to be on topic.

MS. HARWIN: And, your Honor, with respect to the near 20, just, you know, typical sentences are generally about 20 words. And so the near 20 is designed to get at approximately one sentence, where we use near 40 as approximately two sentences.

THE COURT: Right. We'll go with near 20 on Item No. 4.

Item No. 5 --

MS. FISCHER: The differential was approximately 245.

THE COURT: That's just not that many documents. We'll go with near 40 on that one.

MS. FISCHER: We'll withdraw our --

THE COURT: No. 6?

MS. FISCHER: We'll agree to plaintiffs' terms

on 6.

THE COURT: Okay, so that takes us to No. 11. Let's see, this is you're searching for management committee within something-or-other of firing.

MS. HARWIN: That's right. And, your Honor, my understanding is that the search that defendants propose is a near-40 search, only brings up 27 unique documents.

THE COURT: And what would the "and" connector bring up?

MS. FISCHER: That's actually not accurate. It's in the report I'm looking at here. And the number of unique documents -- that's what I alluded to before -- every time you change a search, the unique documents for the other searches change.

THE COURT: True.

MS. FISCHER: So, actually, that would yield -- in our search it was 44; plaintiffs' search, 315. Again, not totally precise; the differential would be about 271.

THE COURT: I'm going to go with near 40 on this one. So far, as you can tell, I'm doing baseball arbitration; I'm not picking a magistrate judge's number in between. But if the differential gets significant enough, I may do that.

MS. HARWIN: Your Honor, given the criticalness of

this particular search to the first Clackamas factor, specifically --

THE COURT: Which one?

MS. HARWIN: This one about firing. And given the small difference of less than 300 documents, I --

THE COURT: Oh, I'm sorry. I misspoke. I said near 40, but I was thinking I'm going with the plaintiffs on this. So I apologize. I'll go with the "and" connector on this one.

All right, moving right along --

MS. FISCHER: The next one, 23, this was actually the most significant of them all. Using plaintiffs' proposal, this yielded over 21,000 unique documents.

THE COURT: That's a lot of documents.

MS. FISCHER: Using defendants' proposal, it yielded just over 10,000 unique documents.

THE COURT: All right, let me take a look at what we're arguing about here. This is the name of the lead plaintiff within some number of words of all kinds of things.

MS. HARWIN: That's right. And --

THE COURT: So this covers a lot of territory.

MS. HARWIN: Well, it covers things specific to this plaintiff. Each of the search terms uses her name.

Her first name is not a, you know, such a common name, so it's not --

THE COURT: No, I understand. You're probably not getting -- well, are you getting -- am I reading this correctly that it would pick up anyone whose name is Campbell even if it's not Kerrie Campbell?

MS. FISCHER: Yes.

THE COURT: Are there other Campbells at the firm?

MS. FISCHER: I am not certain. I am not sure.

I would also add that the other words that are being used, for example, the word "offer"; you know, for example, the word "remove," those are --

THE COURT: Sure. Those are common English words.

MS. FISCHER: -- very common -- exactly, they're very common type of words. So I think the relevant discovery that plaintiffs are looking for here would be coming in the same sentence in pretty close proximity to this person's name.

THE COURT: Right. So taking Ms. Harwin's earlier comment to heart that sentences, particularly lawyer sentences, which are long, can be perhaps 20 words, let's try a "within 20" or a "near 20" connector. On this one you'll get somewhere between 10,000 and 21,000 documents. And, you know, as with all of these, once you see what you

get, you may or may not have a reasoned basis for arguing that there's some additional relevant documents if we just push it to near 25.

MS. HARWIN: Thank you, your Honor.

THE COURT: All right. And then Item No. 24?

MS. FISCHER: The differential is just under 200 documents.

THE COURT: All right, why don't we just go with the plaintiffs' position on that one, which is the "and" connector, correct?

MS. FISCHER: On 26 and 30, we'll withdraw our objections to those, as well.

THE COURT: All right, what about 32?

MS. FISCHER: Thirty-two, also the differential, it's 224 between plaintiffs and defendants.

THE COURT: All right, so go ahead and look at those. We'll give the near-30 on that one.

The search is zooming right along. No. 40?

MS. FISCHER: Forty, also the differential is 116.

THE COURT: So we'll go with near-40.

I'm sorry, you just -- which ones did you just withdraw? You withdrew 26 and 30, is that correct

MS. McKENNA: Yes, your Honor.

MS. FISCHER: Yes.

THE COURT: All right. Hold on one second.

What's left?

MS. FISCHER: Only a few.

THE COURT: Fifty-two and 53.

MS. FISCHER: Fifty-two was actually more significant. The differential is 2,769 unique documents between plaintiffs' and defendants' proposals.

THE COURT: All right, how many hits at near-10?

MS. FISCHER: Well, this is the unique case, 1,226.

THE COURT: And how many -- so that means there are 3,000, almost 4,000, at near-40, correct?

MS. FISCHER: That's correct. It's 3,995.

THE COURT: All right, we're going to go with near-20 on Item 52 on the legal-sentence theory.

And No. 53?

MS. FISCHER: Fifty-three, the differential is 1,846. Plaintiffs' unique counts is about 9,500; defendants' about 7,600, 7671.

THE COURT: All right, we'll go with near-20 on that one.

And No. 60, the last one. I'm so excited.

MS. FISCHER: And is. And we'll also withdraw our objection to 60.

THE COURT: Okay. Now, I do see in the parties' joint letter a reference to a not yet fully ripe dispute, which in fact is not fully ripe but it perhaps would not hurt for me to remind plaintiffs' counsel that under the Federal Rules of Civil Procedure you do actually have to give a reason for discovery objections.

MS. HARWIN: Your Honor, it's our position we have given ample and specific reasons for our discovery objections. We dispute their characterization very much, and we're going to meet and confer with them tomorrow morning at 11:15.

THE COURT: You're going to meet and confer tomorrow morning at 11:15, which is a court holiday. So if you come back to me, it will have to be sometime after that.

Anything else I can do for counsel today?

MS. FISCHER: Yes, your Honor. We wanted to raise the timing and schedule for ESI review and production.

THE COURT: Didn't I already extend it for you at your request?

MS. FISCHER: That's right, your Honor; we extended it. But given, first of all, the additional discovery that was ordered here; in addition, given the volume of ESI, it is quite substantial -- it is quite substantial. I mean, we had already agreed to review 90,000

documents. Based on today's court conference, it looks like that will be somewhere over 100,000 documents. Looking at the 90,000 number, assuming a rate of reviewing 50 documents an hour, that's 1,800 hours of review time. And, of course, that doesn't include the --

THE COURT: That's the first-level review for both privilege and responsiveness?

MS. FISCHER: That would be just the first-level review. We would also do a quality control review, a privilege review, privilege logging, redactions. It's quite a process, as I'm sure the Court's aware. So, you know, presently we are scheduled to produce documents on December 1; but in light of the volume of ESI that's been agreed to and ordered --

THE COURT: I can't remember, because for some reason I don't have my current scheduling order with me, but did I give you a rolling production direction --

MS. FISCHER: No.

MS. McKENNA: No, your Honor.

THE COURT: -- or just a date?

MS. HARWIN: Your Honor, you gave a specific date for the agreed-upon search terms of December 1 and said that that deadline was except the portion, if any, related to search terms and custodians as to which the parties have not

agreed.

THE COURT: Right. So one might say that means that you produce the first 90,000, not produce all of the 90,000 but those that turn out to be discoverable, by December 1; and the additional searches that I just ordered today you'll have extra time on. Are you telling me you can't get the first tranche done by December 1?

MS. FISCHER: I think, your Honor, that we could produce some documents by December 1, but what we would ask, just in light of the volume, would be a very short, perhaps two-week, extension of the December 1 deadline, perhaps to December 15, which would permit us additional time to get this done.

THE COURT: And then how long -- that would be for everything?

MS. FISCHER: Yes, your Honor.

THE COURT: All right --

MS. HARWIN: Plaintiffs consent.

THE COURT: -- let's do that.

So December 15 for ESI. And does that require any other dates to slip?

MS. HARWIN: I don't believe so, your Honor.

MS. McKENNA: No, no, your Honor.

THE COURT: All right. Fine. December 15.

Anything else?

MS. HARWIN: Thank you, your Honor.

THE COURT: Thank you, counsel.

MR. MELZER: Thank you, your Honor.

MS. FISCHER: Thank you.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Campbell, et al. versus Chadbourne & Parke, LLP, et al., Docket #16cv6832, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Carole Ludwig

Signature_____

Date: November 10, 2017